

1 **STATE OF CALIFORNIA**
Department of Industrial Relations
2 Division of Labor Standards Enforcement
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9 **BEFORE THE LABOR COMMISSIONER**
10 **OF THE STATE OF CALIFORNIA**
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12 BENJAMIN PATTERSON,
13 Petitioner,

14 vs.
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16 BLACK ORCHID ENTERTAINMENT,
17 JAMES WARD,

18 Respondents.
19

CASE NO. TAC 39-05

**DETERMINATION OF
CONTROVERSY**

20 The above-captioned matter, a petition to determine controversy under Labor Code
21 §1700.44, came on regularly for hearing on August 10, 2006 in Los Angeles, California,
22 before the undersigned attorney for the Labor Commissioner assigned to hear this case.
23 Petitioner BENJAMIN PATTERSON, (hereinafter, referred to as "Petitioner"), appeared and
24 was represented by Arnold P. Peter of Raskin Peter Rubin & Simon LLP. Respondents
25 BLACK ORCHID ENTERTAINMENT and JAMES WARD, (hereinafter, collectively
26 referred to as "Respondents" or "Respondent WARD"), appeared and were represented by

1 Robert W. Woods of Isaacman, Kaufman & Painter.

2 Based on the evidence presented at this hearing and on the other papers on file in this
3 matter, the Labor Commissioner hereby adopts the following decision.

4 **FINDINGS OF FACT**

5 1. Petitioner, an actor and model, is a resident of the State of California.

6 2. Respondents are not licensed as talent agents with the State of California
7 Labor Commissioner's Office.

8 3. In 2002, Petitioner was enrolled in an acting class in Studio City, California.
9 Each Thursday evening, the class instructor brought in different people from the
10 entertainment industry to meet the students. On one Thursday evening in October, 2002,
11 Respondent WARD, who was identified as a talent manager, was brought in as one of the
12 guests. After the class was over, Petitioner handed Respondent WARD his resume and head
13 shot and asked if he could read for him at a later date. In response, Respondent WARD
14 handed Petitioner his business card and told Petitioner that if he had not heard from him in a
15 couple of days, that he should give him a call. Respondent WARD called Petitioner a
16 couple of days later and set up a meeting at his office. At this meeting, Petitioner performed
17 an audition scene for Respondents. Soon thereafter, Respondents and Petitioner entered into
18 a written management agreement dated October 14, 2002.

19 4. At the time that Petitioner entered into the management agreement with
20 Respondents on October 14, 2002, Petitioner already had a commercial agent and a print
21 agent. Consequently, Petitioner testified that he informed Respondents that they would not
22 be entitled to commissions on print or commercial work. Respondents dispute that
23 commercial work was excluded from the list of activities they could commission.

24 5. On January 7, 2005, the parties entered into a renewal contract. Petitioner
25 testified that he had a similar conversation with Respondents regarding entitlement to
26 commissions for print or commercial work. Again, Respondents dispute that they were not
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entitled to commissions on commercial work.

6. Respondent WARD testified that as Petitioner's manager, one of the first things that he did was to find Petitioner a theatrical agent, Kazarian/ Spencer and Associates, (hereinafter, referred to as "KSA"). Petitioner testified that Respondents also coached him and gave him feedback on his performances. Additionally, they prepared him for auditions and called casting directors to follow up on his performances at the various auditions. Furthermore, at the hearing on this matter, Respondents introduced copies of e-mails sent to Respondents and Petitioner from KSA notifying them of jobs procured for Petitioner. Respondent WARD testified that once he was notified of such auditions, his job was to coordinate with KSA to make sure Petitioner was available, was notified of the date, and was prepared for the auditions.

7. Both parties testified that on April 21, 2005, Petitioner and Respondent WARD got into a dispute over the phone regarding payment of residuals to Respondents on two GAP commercials that Petitioner had booked in January and March of 2005. It is undisputed that both commercials were booked for Petitioner through his commercial agent. During the phone conversation, Respondent WARD informed Petitioner that he did not want to represent him if he wasn't going to pay him for the two commercials and then hung up on him. Petitioner testified that Respondent WARD called back right away and informed him that he had talked to his attorney and that he would continue representing him because he had signed a contract with him and also stated that Petitioner was obligated to pay commissions on the two GAP commercials per the terms of their written management agreement.

8. Later that day, Respondent WARD e-mailed Petitioner regarding Respondents' website and stated, "this is a piece of the website, and one of the reasons it's not so easy to just drop you. You are entrenched into the site. It's going to cost a lot more time and money to change...." In response, on April 29, 2005, Petitioner e-mailed

1 Respondent WARD back writing, among other things, "I don't think that you honestly think
2 that any amount of training, advise, or coaching could have helped book a commercial in
3 which all we did was slate and take poleroids [sic]. Yet you still expect me to just pay you
4 commissions..." The e-mail ended with the following, "[h]owever if the money that I am
5 supposed to live on is being divided up so much that I can not afford to live above the
6 poverty level (less than 15,000. A year not eating out of the trash), then I have to make the
7 necessary changes to keep my buisness [sic] running smooth." There was testimony that
8 Respondent WARD responded to the e-mail by writing, "Do you believe in karma?"
9 However, it is unclear whether the parties spoke again before Petitioner filed the instant
10 petition on September 27, 2005.

11 9. In the petition, Petitioner alleges that Respondents acted as a talent agency by
12 attempting to procure and by procuring employment for him and requesting 15%
13 commissions on all jobs in film, television and commercials. Petitioner seeks a
14 determination that the renewal agreement dated January 7, 2005 is illegal and unenforceable
15 and that Petitioner does not owe any compensation to Respondents nor is he obligated to an
16 arbitration hearing.

17 LEGAL ANALYSIS

18 1. Petitioner is an "artist" within the meaning of Labor Code §1700.4(b).

19 2. Labor Code §1700.4(a) defines "talent agency" as "a person or corporation
20 who engages in the occupation of procuring, offering, promising, or attempting to procure
21 employment or engagements for an artist."

22 3. Labor Code §1700.5 provides that "[n]o person shall engage in or carry on the
23 occupation of a talent agency without first procuring a license...from the Labor
24 Commissioner."

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4. Petitioner has the burden of proving that Respondents unlawfully acted as talent agents.

“The burden of proof is found at Evidence Code §115 which states, ‘[e]xcept as otherwise provided by law, the burden of proof requires proof by preponderance of the evidence.’ Further, *McCoy v. Board of Retirement of the County of Los Angeles Employees Retirement Association* (1986) 183 Cal.App.3d 1044 at 1051 states, ‘the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by preponderance of the evidence.’ (cite omitted) **‘Preponderance of the evidence’ standard of proof requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.**”

In re Michael G. 74 Cal.Rptr.2d 642, 63 Cal.App.4th 700 [Emphasis added]; See also *Robi v. Wolf*, TAC No. 29-00 at pp.6-7, *Behr v. Dauer*, TAC No. 21-00 at pp. 8-9.

We find that Petitioner has failed to meet this burden. Petitioner has not provided any evidence of Respondents procuring or even attempting to procure a single engagement or employment opportunity on his behalf. The only evidence provided by Petitioner is a cover letter attached to the renewal contract, dated December 29, 2004, where Respondent WARD writes, "we will continue to submit you and call Casting Directors to get into those doors." This statement, without anything more, is insufficient to show that Respondents actually procured or even attempted to procure any engagements or employment opportunities for Petitioner. In fact, Petitioner admits that at all times relevant, he was represented by a licensed talent agency. Moreover, the evidence presented shows that KSA was responsible for booking employment and engagements for Petitioner. While it appears that Respondents worked closely with KSA in coordinating the auditions KSA procured, this is permitted under the Labor Code. Specifically, Labor Code §1700.44(d) provides: "It is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract." Thus, to the extent that Respondents coordinated the various auditions for Petitioner, we find that based on the evidenced presented, it was done at the


1 request of and in conjunction with KSA, which is a licensed talent agency.

2 4. Having found that Petitioner has not met his burden of proof, we deny the
3 petition.

4 **ORDER**


5 For the reasons set forth above, IT IS HEREBY DETERMINED that the Petition to
6 Determine Controversy filed by Petitioner is denied.

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9 Dated: February 6, 2007


EDNA GARCIA EARLEY
Special Hearing Officer

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12 **Adopted:**

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15 Dated: February 6, 2007


ROBERT JONES
Acting State Labor Commissioner

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA)
3 COUNTY OF LOS ANGELES) ss.

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and
5 not a party to the within action. My business address is DIVISION OF LABOR STANDARDS
6 ENFORCEMENT, Department of Industrial Relations, 320 W. 4th Street, Suite 430, Los Angeles, CA
7 90013.

8 On **February 9, 2007**, I served the following document described as:

9 **DETERMINATION**

10 on the interested parties in this action [TAC 39-05] by placing

11 ☐ the originals

12 ☒ a true copy thereof enclosed in a sealed envelope addressed as follows:

13 Arnold P. Peter
14 Raskin Peter Rubin & Simon LLP
15 1801 Century Park East, Suite 2300
16 Los Angeles, CA 90067-2325
17 (310) 277-1980 Fax

18 Robert W. Woods
19 Isaacman, Kaufman & Painter
20 8484 Wilshire Blvd., Suite 850
21 Beverly Hills, CA 90211
22 (323) 782-7744 Fax

23 ☒ BY MAIL I am readily familiar with the firm's business practice of collection and processing
24 of correspondence for mailing with the United States Postal Service and said
25 correspondence is deposited with the United States Postal Service the same day.

26 ☒ BY FACSIMILE I sent a copy of said document by fax machine for instantaneous transmittal
27 via telephone line to the offices of the addressee(s) listed above using the following
28 telephone number(s): **as indicated above.**

☐ BY PERSONAL SERVICE I delivered a copy of said document to the parties set forth
above, as follows:

Executed on February 9, 2007, at Los Angeles, California. I declare under penalty of perjury
the foregoing is true and correct.

Edna Garcia Earley